HOLIDAY VILLAGES OF MALAYSIA SDN BHD

v.

YB MENTERI SUMBER MANUSIA & ANOR

HIGH COURT MALAYA, KUANTAN
SURAYA OTHMAN J
[ORIGINATING MOTION NO: 25-9-1998]
6 JUNE 2008

ADMINISTRATIVE LAW: *Remedies - Judicial review - Application for - Certiorari - Recognition of trade union - Whether first respondent committed an error of law or misdirected himself in law - Whether decision tainted with illegality, irrationality and procedural impropriety - Whether court could exercise discretionary power of judicial review to quash decision*

LABOUR LAW: *Trade union - Recognition - Claim for - Membership verification - Whether there was sufficient material and evidence to support the finding of the 59.32 percentage of membership - Whether there was legal requirement for DGTU and first respondent to distinguish between seasonal or permanent workmen for purpose of trade union recognition - Whether first respondent's decision so outrageous or defiance of logic - Whether tainted with illegality, irrationality and procedural impropriety - Whether court could exercise discretionary power of judicial review to quash decision*

This was an application by the applicant for judicial review for an order of *certiorari* to quash the decision of the first respondent made under s. 9(5) of the Industrial Relations Act 1967 ('IR Act') ordering the applicant to accord recognition to the second respondent as a trade union representing all employees of the applicant excluding those in the managerial, executive, confidential and security capacity. The applicant owned and operated an integrated holiday village complex known as Club Mediterranean Cherating Resort Village. The second respondent was a trade union of workmen registered under the Trade Unions Act 1959 ('TU Act'). The applicant employed two categories of employees, permanent and seasonal employees. The seasonal employees were, according to the applicant, employed for a maximum period of about ten months from February to November and whose employment would cease when the resort closed for business during the period commonly known as the 'monsoon period' and may or may not be employed thereafter. On 10 September 1997,

A the second respondent claimed recognition in Form A from the applicant, to represent all the employees other than those in the managerial, executive, confidential and security capacity. Since there was no feedback from the applicant, the second respondent by a letter dated 10 October 1997, informed the Director General
B of the Industrial Relations ('DGIR') about the claim of recognition and requested that action be taken under s. 9(4) of the IR Act. By a letter dated 7 November 1997, the second respondent made a complaint to the IRD that the applicant had refused to continue to employ about 80 employees as from 6 November
C 1997 without giving them any letter to the effect. On 16 December 1997, the applicant informed the DGIR by a letter that the contract of employment of many of their employees had come to an end around the period between 2 November 1997 to 8 November 1997 and as at 16 December 1997, 85.6% of their
D employees had ended their contract and only 13.5% of their employees still continued with their employment. In view thereof, the applicant requested the DGIR to carry out a membership verification in deciding whether to accord recognition to the second respondent. A membership verification exercise was
E conducted by the Jabatan Hal Ehwal Kesatuan Sekerja and by a letter dated 12 March 1998, the DGIR was informed that 59.32% of the employees were members of the union. The IRD thus advised the applicant to accord recognition to the second respondent, which the applicant failed to do. The DGIR gave
F notice under s. 9(4C) of the IR act to the applicant. By letter dated 8 June 1998, the applicant and the second respondent were informed of the first respondent's decision dated 1 June 1998 made under s. 9(5) of the IR Act by which he had ordered the applicant to recognize the second respondent as a trade union
G representing all the applicant's employees with effect from 10 September 1997. The applicant challenged the said decision by the first respondent on these grounds: (i) the first respondent had committed an error of law when he had acted without sufficient material or evidence and failed to take into account matters which
H he ought to take into account; (ii) the first respondent had misdirected himself in fact and in law when he considered the seasonal employees of the applicant in coming to his decision; (iii) the first respondent's decision was tainted with illegality and irrationality and procedural impropriety.

I

Held (dismissing the application):

(1) On receiving the claim for recognition, the process under s. 9 of the IR Act took its course. The DGTU had arrived at the figure 59.32% being the percentage of workmen in respect of whom recognition was being sought and who were members of the union making the claim. The manner of calculation arrived at by the DGTU was as prescribed under reg. 65 of the TU Regulations. The DGTU did follow strictly the letters of the law before coming to his conclusion on the percentage of women. The law only required the DGTU and the first respondent to ascertain the percentage of trade union membership within the second respondent's scope of representation as at the date of the claim of recognition *ie*, 10 September 1997 and not at any other dates. Therefore, the membership verification exercise done for the claim for recognition was based on the number of workmen as at the correct date. Further, the applicant was bound by its letter dated 26 May 1998 whereby it opined that for the purpose of recognition, both the permanent and seasonal employees had to be taken into account for the purpose of membership verification. The majority of the employees employed by the applicant as at 10 September 1997 were also employed by the applicant from January 1998. There was more than sufficient material and evidence to support the finding of the 59.32% percentage of membership as at 10 September 1997 and as such the first respondent had taken all the relevant matters into account when he made his decision on 1 June 1998. Therefore, the first ground of challenge must fail. (paras 35 & 42)

(2) There was no legal requirement for the DGTU or the first respondent to distinguish between seasonal or permanent workmen for purposes of trade union recognition. By such definitions, the terms 'workman' and 'contract of employment' under the said Act does not exclude seasonal employees. It does not spell out the duration of employment needed before one can be considered a 'workman' and thus receive protection under the Act. Thus, there is no distinction made between temporary, casual or permanent employees as far as the law is concerned. The definition of a contract of employment does not relate to the length of time or period of employment, otherwise it would lead to absurdity, for all an

employer has to do is to simply classify his employees as 'seasonal employees' and thereby escape the statutory liabilities under the IR Act. This should not be allowed as it would defeat the purpose and object the IR Act was enacted in the first place. Taken in this light, the second ground of challenge must fail. (paras 45 & 46)

(3) The first respondent's decision made on 1 June 1998 was one which any decision maker, similarly circumstanced, would have made. It was not a decision that was so outrageous or in defiance of logic. It was not tainted with any 'wednesbury unreasonableness' at all. The third ground of challenge too must also fail. The applicant had failed to show any valid or cogent grounds upon which this court could exercise its discretionary power of judicial review to quash the decision of the first respondent. (paras 57 & 58)

Case(s) referred to:

Associated Provincial Picture House Ltd v. Wednesbury Corporation [1948] 1 KB 223 ***(refd)***

Booi Kim Lee v. YB Menteri Sumber Manusia, Malaysia & Anor [1999] 4 CLJ 121 HC ***(refd)***

Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159 SC ***(refd)***

Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor [2005] 3 CLJ 517 CA ***(refd)***

Korea Development Corporation & Construction Worker's Union [1983] ILR Vol 2 ***(refd)***

Pahang South Union Omnibus Co Bhd v. The Minister of Labour & Manpower & Anor [1981] CLJ (Rep) 74 ***(refd)***

Reg v. Entry Clearance Officer, Bombay, Ex p Amin [1983] 2 AC 818 ***(refd)***

Tanjong Jaga Sdn Bhd v. Minister of Labour and Manpower & Anor [1987] 2 CLJ 119; [1987] CLJ (Rep) 368 SC ***(refd)***

Legislation referred to:

Industrial Relation Act 1967, ss. 2, 9(2), (3)(b), (4A), (4B), (4C), (5), (6), 10(2)

Interpretation Acts 1948 and 1967, s. 17A

Public Authorities Protection Act 1940, s. 2(b)

Trade Unions Act 1959, s. 26(3)

Trade Union Regulations 1959, reg. 62, 63, 64, 65, 66

For the applicant - Gan Khong Aik; Ms Lee Hishammudin Allen & Gledhill
For the 1st respondent - Afandi Nazilah Abdullah SFC
For the 2nd respondent - B Lobo; M/s Lobo & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

Suraya Othman J:

Introduction

[1] This is an application by the applicant (Holiday Villages of Malaysia Sdn Bhd) for judicial review for an order of *certiorari* to quash the decision of the 1st respondent (Menteri Sumber Malaysia) made on 1 June 1998 under s. 9(5) of the Industrial Relation Act 1967 (Act 177) ("IR Act") ordering the applicant to accord recognition to the 2nd respondent (Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar dan Restoran Semenanjung Malaysia) as a trade union representing all employees of the applicant excluding those in the managerial, executive, confidential and security capacity.

Facts And Background

[2] Briefly, the facts of the case are as follows:

(1) The applicant is a company incorporated in Malaysia and owns and operates an integrated holiday village complex known as Club Mediterranean Cherating Resort Village.

(2) The 2nd respondent is a trade union of workmen registered under the Trade Unions Act 1959 ("TU Act").

(3) The applicant employed 2 categories of employees, permanent and seasonal employees. The seasonal employees are, according to the applicant, employed for a maximum period of about ten months from February to November and whose employment will cease when the resort closed for business during the period commonly known as the "monsoon period" affecting the east coast of West Malaysia (late November to January). The seasonal employees may or may not be employed thereafter, depending on various factors including whether the employees wish to be re-employed by the applicant.

(4) On 10 September 1997, the 2nd respondent claimed recognition in Form A from the applicant, to represent all the employees other than those in the managerial, executive, confidential and security capacity with effect from 10 September 1997.

(5) Since there was no feedback from the applicant, the 2nd respondent by a letter dated 10 October 1997, informed the Director General of the Industrial Relation ("DGIR") about the claim of recognition and requested that action be taken under s. 9(4) of the IR Act.

(6) By a letter dated 25 October 1997, the Industrial Relation Department ("IRD") requested the applicant to submit a list of their employees as at 10 September 1997 excluding those who are employed in the managerial, executive, confidential and security capacity in Form B. Meanwhile, the 2nd respondent was also requested to submit a list of the applicant's employees who were their members in Form C.

(7) By a letter dated 7 November 1997, the 2nd respondent made a complaint to the IRD that the applicant has refused to continue to employ about 80 employees as from 6 November 1997 without giving them any letter to the effect.

(8) On 16 December 1997, the applicant informed the DGIR by a letter that the contract of employment of many of their employees had come to an end around the period between 2 November 1997-8 November 1997 and as at 16 December 1997, 86.5% of their employees had ended their contract and only 13.5% of their employees still continue with their employment. In view thereof, the applicant requested the DGIR to carry out a membership verification in deciding whether to accord recognition to the 2nd respondent. The applicant also submitted Form B with the list of their employees, permanent and seasonal as at the relevant date ie, 10 September 1997 (see encl. 1A, exh. 'A3' of the applicant's affidavit).

(9) By a letter dated 3 January 1998, the 2nd respondent submitted Form C together with the list of its members names.

(10) On 26 January 1998, the Trade Union's Department ("TUD") informed the applicant and the 2nd respondent by letter that a membership verification exercise will be conducted and all the necessary steps will be taken by Pengarah Kesatuan Sekerja Selangor, Wilayah Persekutuan Pahang.

(11) By a letter dated 21 February 1998, the Jabatan Hal Ehwal Kesatuan Sekerja informed the 2nd respondent and the applicant that a membership verification exercise will be conducted on 26 February 1998.

(12) By a letter dated 12 March 1998, Jabatan Hal Ehwal Kesatuan Sekerja informed the results of the membership verification to the DGIR. It showed that 59.32% of the employees are members of the union.

(13) The IRD informed the applicant and the 2nd respondent about the result of the membership verification by a letter dated 9 April 1998 and advised the applicant to accord recognition to the 2nd respondent.

(14) The applicant failed to accord recognition to the 2nd respondent and the DGIR gave notice under s. 9(4C) of the IR Act to the applicant by a letter dated 2 May 1998.

(15) The applicant replied by letter dated 26 May 1998, informing the IRD that their investigation of the union membership showed:

(a) less than 10% of the Applicant's Permanent Employees are the 2nd respondent's members:

(b) it was impossible that 50% of the Applicant's Permanent Employees and Seasonal Employees are the applicant's members;

(c) for the purpose of membership verification, the membership of both the Permanent and Seasonal Employees ought to be taken into account (see encl. 1A exh. 'A9' of the applicant's affidavit).

(16) By letter dated 8 June 1998, the applicant and 2nd respondent were informed of the 1st respondent's decision dated 1 June 1998 made under s. 9(5) of the IR Act by which he had ordered the applicant to recognize the 2nd respondent as a trade union representing all the applicant's employees with effect from 10 September 1997. A copy of the said letter and the 1st respondent's said decision is marked as exh. "A10" attached to the applicant's affidavit. It is that decision that is now being challenged by the applicant herein.

Grounds For Judicial Review By Applicant

[3] The applicant challenged the 1st respondent's decision on grounds as follows:

(1) The 1st respondent had committed an error of law when he had acted without sufficient material or evidence and failed to take into account matters which he ought to take into account.

(2) The 1st respondent misdirected himself in fact and in law when he considered the seasonal employees of the applicant in coming to his decision.

(3) Because of (1) and (2) above, the 1st respondent decision was tainted with illegality and irrationality and procedural impropriety.

The Roles And The Functions Of The Court In Judicial Review

[4] The principles relating to the function of the court in dealing with judicial review has been well enunciated in a number of authorities. First and foremost is the principle that the court does not act as an appeal court in such matters. This is cited in the case of *Reg v. Entry Clearance Officer, Bombay, Ex p Amin* [1983] 2 AC 818 at p. 829 where Lord Fraser of Tullybelton observed that:

> Judicial review is concerned not with merits of a decision but with the manner in which the decision was made. Judicial review is entirely different from an ordinary appeal. It is made effective by the courts quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer. (See also *Minister of Labour Malaysia v. Lie Seng Fatt* [1990] 2 MLJ 9 at pg 11 and *National Union of Hotel, Bar and Restaurant Workers v. Minister of Labour & Manpower* [1980] 2 MLJ 189 at pg 190).

When Can The Court Interfere

[5] The Federal Court in the case of *Pahang South Union Omnibus Co. Bhd v. The Minister of Labour & Manpower & Anor* [1981] CLJ (Rep) 74 at p. 78 states that:

> ... it is settled law that the court may exercise its judicial power and interfere if the decision making body is influenced by considerations which ought not to influence it or fails to take into account matters which it ought to take into account.

[6] And in *Minister Of Labour Malaysia v. Lie Seng Fatt (supra),* the Supreme Court states that when the law vests a discretion on an authority, that authority is given a very wide discretion but such discretion is not unlimited. As long as the authority concerned had exercised the discretion without improper motive the exercise of discretion must not be interfered with, unless it can be shown that the particular authority *had misdirected itself, had taken into account irrelevant matters or had not taken into consideration relevant matters or that the decision militates against the object of the statute.* (emphasis added)

[7] Furthermore, Lord Diplock in the case of *Council of Civil Service Unions & Ors v. Minister of Civil Service* as adopted by Justice KC Vohrah in *Booi Kim Lee v. YB Menteri Sumber Manusia & Anor* [1999] 4 CLJ 121 has classified the grounds subject to control by judicial review under the following heads:

(a) Illegality – the authority concerned has been guilty of an error of law in its action, ie, purporting to exercise a power it does not have.

(b) Irrationality – the authority exercise a power in so an unreasonable manner (Wednesbury principle).

(c) Procedural Impropriety – failure of the authority to observe procedural rules even though such failure does not involve any denial of natural justice.

The Provisions Under The Acts And Regulations

[8] It is pertinent before delving into the issues, that certain provisions of the law under the relevant Acts and regulations are laid down. The relevant law applicable to the issues are the Industrial Relation Act 1967 (Act 177) ("IR Act"), Trade Union Act 1959 (Act 262) ("TU Act"), Industrial Relations Regulations 1980 ("IR Regulations") and the Trade Union Regulations 1959 ("TU Regulations").

[9] The relevant provision for the recognition of Trade Union is provided under s. 9 of the IR Act.

[10] Section 9(2) of the IR Act provides for Trade Union to serve on the employer in writing a claim for recognition.

[11] An employer who has been served with such a claim may after 21 days from service of the claim:

(a) accord recognition; or

(b) if recognition is not accorded notify the Trade Union concerned in writing the grounds for not according recognition; or

(c) apply in writing to the DGIR to ascertain whether the workmen in respect of whom recognition is being sought are members of the Trade Union (s. 9(3)).

[12] If the Trade Union received a notification under s. 9(3)(b) of the IR Act or where the employer concerned fails to comply with s. 9(3) of the IR Act the Trade Union may report to the DGIR in writing (s. 9(4)).

[13] Section 9(4A) of the IR Act provides that upon receiving an application under s. 9(3) or a report under s. 9(4) the DGIR is empowered to take steps or make inquiries to resolve the matter.

[14] In order to perform his function under s. 9(4A) the DGIR is vested with the powers to require the Trade Union, the employer or Trade Union of employees to furnish any information he deems necessary.

[15] The DGIR is also given the discretion by s. 9(4B) of the IR Act to refer to the DGTU for the DGTU's decision on any question of the competence of the Trade Union to represent any workmen in respect of whom recognition is sought.

[16] If the DGIR cannot resolve the matter pursuant to s. 9(4A) of the IR Act he shall notify the Minister.

[17] The Minister is required by s. 9(5) of the IR Act to give his decision either to accord recognition or otherwise.

[18] Whereas in TU Act, s. 26(3) states that in a situation where a Trade Union has served a claim for recognition, the DGIR may request the DGTU to carry out a membership check in a manner prescribed by regs. 63, 64, 65 and 66 of the TU Regulations. The purpose is for ascertaining the percentage of workmen in respect of whom recognition is being sought, who are members of the union making the claim.

[19] The DGTU may in writing notify the Trade Union making a claim for recognition that a membership check would be conducted either by membership verification or by a secret ballot. A copy of such notification shall be sent to the employer (reg. 63 of the TU Regulations).

[20] Both the employer and the Trade Union are to assist the DGTU with information as he may require to enable the DGTU to conduct the membership check (reg. 64 of the TU Regulations).

[21] Regulation 65 of the TU Regulation prescribed the formula to ascertain the percentage of membership as follows:

(a) **Membership Verification**

$$\frac{\text{Total number of valid members as at the date of the claim}}{\text{Total number of workmen in respect of whom recognition is being sought at the date of the claim}} \times 100\%$$

(b) **Membership check by secret ballot**

$$\frac{\text{Number of votes indicating membership}}{\text{Number of workmen entitled to vote}} \times 100\%$$

[22] The DGTU shall notify the DGIR the result of the membership check (reg. 66 of the TU Regulations).

Grounds Of Judgment

[23] At the outset all parties agreed that there is no issue as to the effect of the ouster clause, ie, s. 9(6) of the IR Act and that this court has jurisdiction. Parties also agreed that for the purposes of this application the relevant date to focus on issues is the date recognition was sought ie, 10 September 1997.

[24] I shall now deal with this application. The grounds as put up by the applicant are three folds but in essence, the main thrust of the ground of challenge by the applicant was premised on one main issue, primarily that the 1st respondent in according recognition to the 2nd respondent should not have included the seasonal employees as being part of the applicant's employees as at 10 September 1997.

[25] Having said that, after perusing the applicant's affidavit with its accompanying exhibits and hearing Mr Gan Khong Aik for the applicant, this court feels that the applicant's stand is convoluted and a contradiction in terms. The applicant is blowing hot and cold. What was said in submission, what is stated in the affidavit and what is in the applicant's exhibits runs contrary to each other.

[26] In the applicant's submission, Mr Gan contended that the 1st respondent erred in law when he failed to take into account both permanent and seasonal employees for membership verification, then in the second breath he alleged that the 1st respondent misdirected himself when he considered the seasonal employees as part of the employees of the applicant in coming to his decision, then in his third breath submitted that the seasonal employees ought not to be taken into account in deciding whether more than 50% of the applicant's employees are members of the 2nd respondent. With such erratic and unclear stand taken by Mr Gan, I have to ask myself what were the actual materials or evidence that was put before the 1st respondent, before he made that decision on 1 June 1998.

[27] There were two letters from the applicant which were material and of utmost importance which led to the 1st respondent according recognition to the 2nd respondent to represent all employees of the applicant excluding those in the managerial, executive, confidential and security capacity. These letters are mentioned in paras 8 and 15 under the heading facts and background, that is the letter dated 16 December 1997 and 26 May 1998 respectively.

[28] The first letter dated 16 December 1997 was in response to the DGIR in relation to the claim for recognition by the 2nd respondent to represent the applicant's employees. In that letter, the applicant informed the DGIR that the contract of employment of many of their employees had come to an end around the period

between 2 November 1997-8 November 1997 and as at 16 December 1997, 86.5% of their employees have ended their contract and only 13.5% of their employees still continue with their employment. In view thereof, the applicant requested, in fact supported the DGIR's proposal to carry out a membership verification in deciding whether to accord recognition to the 2nd respondent. The applicant also submitted Form B with the list of their employees, permanent and seasonal as at the relevant date ie, 10 September 1997.

[29] The second letter, dated 26 May 1998 was in response to the letter by IRD informing the applicant that the membership verification showed 59.32% of the applicant's employees are members of the 2nd respondent and also in response to the notice received from the DGIR under s. 9(4C) of the IR Act to accord recognition to the 2nd respondent.

[30] In that letter the applicant stated as per below:

> Pemeriksaan kami ke atas keahlian Kesatuan tersebut di atas menunjukkan bahawa tidak sampai 10% pekerja tetap kami adalah ahli Kesatuan tersebut di atas. Pemeriksaan kami juga menunjukkan bahawa tidak mungkin 50% daripada ke semua pekerja tetap dan bermusim kami adalah ahli Kesatuan tersebut di atas. *Adalah pendapat kami untuk tujuan pengiktirafan, keahlian Kesatuan tersebut di atas mesti mengandungi kedua-dua pekerja tetap dan bermusim. Hanya mengadakan pekerja bermusim sebagai ahli Kesatuan tersebut adalah tidak memberi gambaran yang betul tentang kedudukan pekerja kami.*

The English translation, in gist:

> Our investigation shows that not more than 10% of our permanent employees are members of the said Union. Our investigation also shows that it is not possible that 50% of all our permanent and seasonal employees are member of the said Union. *It is our opinion that for the purpose of recognition, the members of the union must contain both the permanent and seasonal employees. Having only seasonal employees as members of the said union will not give a true reflection of the status of our employees.* (emphasis added)

[31] Looking at the said letter above, it is crystal clear that the applicant wanted both the seasonal and permanent employees to be taken into account, ie, both categories must be members of the Union before recognition can be accorded to the 2nd respondent. In other words for the purpose of membership verification, the

membership of both the permanent and seasonal employees ought to be taken into account, and the combination of the two categories of employees must be more than 50% before representation by 2nd respondent can be accorded.

[32] Having explicitly said this in their letter, the applicant cannot now come to court and retract and change tune. This was what happened on 25 September 1998, whereby Mr Gan once again changed gear and submitted that since the seasonal employees as at 10 September 1997 will not be with the applicant thereafter, they therefore should not be included in calculating the percentage, again shifting his stand to suit his whims and fancies.

[33] As stated earlier, I have to ask myself what were the actual materials or evidence that was put before the 1st respondent, before he made his decision to accord recognition on 1 June 1998. Since Mr Gan's submission was convoluted, I have to seek assistance from Mr B. Lobo and En. Afandi Nazilah to sieve through the exhibits to get a true perspective of the whole situation.

(1) Whether the 1st respondent had committed an error of law when he had acted without sufficient material or evidence and failed to take into account matters which he ought to take into account.

(2) Whether the 1st respondent misdirected himself in fact and in law when he considered the seasonal employees of the applicant in coming to his decision.

[34] It has to reiterated that parties have agreed that for the purpose of this application the relevant date to focus on issues is the date recognition was sought *vide* statutory Form A filed with the DGIR which is on 10 September 1997 (the relevant date).

[35] On receiving the claim for recognition, the process under s. 9 of the IR Act takes its course. The DGIR in carrying out his functions under s. 9 of the IR Act and reg. 4 IR regulations, requested the DGTU to ascertain and inform him as to whether or not the workmen in respect of whom the claim for recognition is made are members of the Trade Union making the claim. In relation to this the DGIR under s. 26(3) of the TU Act requested the DGTU to carry out a membership verification exercise for the

purpose of ascertaining the percentage of the workmen in respect of whom recognition is being sought, who are members of the union making the claim. The DGTU under reg. 63 and 64 carried out a membership verification as illustrated in the 1st respondent affidavit, exh. B7 and arrived at the figure 59.32%, being the percentage of workmen in respect of whom recognition is being sought, who are members of the union making the claim.

[36] The manner of calculation arrived at by the DGTU was as prescribed under reg. 65 of the TU Regulations. Therefore it can be seen that the DGTU did follow strictly the letters of the law before coming to his conclusion on the percentage of workmen.

[37] The applicant claims that there are two categories of employees as at 10 September 1997; the first category is 'Group A' (permanent basis) and the second category is 'Group B' (seasonal basis). The applicant also claims that the employees who were on the applicant's payroll as at 10 September 1997 were no longer with the applicant from November 1997. Their contract of employment had come to an end from 2 November 1997 till 8 November 1997.

[38] The applicant made a distinction between the permanent and seasonal employees. Is there such a distinction under the law? The applicant while agreeing to the relevant date ie, 10 September 1997 as being the cut off date to ascertain the percentage of its workmen, who were members of the 2nd respondent, harped on the fact that a majority of them will be leaving their employment after November 1997. Is this a consideration which the 1st respondent has to take.

[39] Firstly, the law only requires the DGTU and the 1st respondent to ascertain the percentage of trade union membership within the 2nd respondent's scope of representation as at the date of the claim of recognition, ie, 10 September 1997 and not at any other dates, (see reg. 4(1) of the IR Regulations)

[40] Regulation 62 of the TU Regulations also provides:

> "date of claim" means the date as of which Form A prescribed under the Industrial Relation Regulations 1980 is dated.

[41] In *Korea Development Corporation & Construction Worker's Union* [1983] ILR Vol. 2, the Industrial Court held that the membership check that was carried out by the Registrar of Trade Unions was for the purposes of determining whether the majority of employees of the company are members of the union. The date of the claim for recognition is the relevant date. It does not matter if at the time of the check, the employees had resigned from the union or that more employees had been employed by the company.

[42] Therefore the membership verification exercise done for the claim for recognition was based on the number of workmen as at the correct date. The fact that 86.5% of the applicant's employees were no longer in the employment of the applicant as at 16 December 1997 was of no relevance and should not be a factor for consideration in calculating the percentage. Anyway, the applicant is bound by its letter dated 26 May 1998 whereby it opined that for the purpose of recognition, both the permanent and seasonal employees have to be taken into account for the purpose of membership verification. Looking at the applicant's exhibits (A3 and A7), the majority of the employees employed by the applicant as at 10 September 1997 were also employed by the applicant from January 1998. Taken in this light, there was more than sufficient material and evidence to support the findings of the 59.32% percentage of membership as at 10 September 1997 and as such the 1st respondent had taken all the relevant matters into account when he made his decision on 1 June 1998. Therefore the first ground of challenge must fail.

[43] Secondly, there is no legal requirement for the DGTU or the 1st respondent to distinguish between seasonal or permanent workmen for purposes of trade union recognition. The term "workman" under s. 2 of the IR Act is defined as "... any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward ..." The term "contract of employment" in that same section is defined as "... any agreement, whether oral or in writing and whether express or implied, whereby one person agrees to employ another as a workman and that other agrees to serve his employer as a workman." By such definitions, the terms "workman" and "contract of employment" under the said Act does NOT exclude seasonal employees. This is so since it does not spell out the duration of employment needed before one can be considered a "workman" and thus receive protection under the Act.

[44] The contention that there is no distinction between permanent and seasonal employees can be seen in the case of *Kelab Lumba Kuda Perak v. Menteri Sumber Manusia, Malaysia & Anor* [2005] 3 CLJ 517. In this case, one of the grounds for the appellant to seek *certiorari* to quash the decision of the 1st respondent was the illegal exclusion of temporary employees from the scope of representation of the 2nd respondent. The Court of Appeal referred to s. 2 of the IR Act which defines a workman as any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purpose of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute. Therefore the Court of Appeal held that:

> Based on the above mentioned statutory provisions, it would be wrong to exclude workmen who do not fall within the four categories above mention from the scope of union representation. Clearly, it would be illegal to exclude temporary employees from the scope of representation of the union. In fact no distinction is made between temporary, casual or permanent employees ...
>
> We would think at the very least, the DGTU was obliged statutorily to verify whether the employees in the amended list were employees within the scope of representation. It is our view that the failure of the DGTU to include the temporary and casual employees in the verification exercise was an error committed in breach of the provisions of the TU Act and the IR Act and this nullified the entire recognition exercise.

[45] As can be seen there is no distinction made between temporary, casual or permanent employees as far as the law is concerned. Likewise, seasonal employees, they too should be treated the same. Under s. 17A of the Interpretation Acts 1948 and 1967 (Act 388), due regard must be given to the purpose of the Act. Section 17A stated:

> 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[46] Therefore to promote the purpose or object of the Act, there should not be any distinction made between one and the other (seasonal and non-seasonal workmen). As submitted by Mr B. Lobo, the definition of a contract of employment does not relate to the length of time or period of employment, otherwise it would lead to absurdity, for all an employer has to do is to simply classify his employees as "seasonal employees" and thereby escape the statutory liabilities under the IR Act. This should not be allowed as it would defeat the purpose and object the IR Act was enacted in the first place. Taken in this light, the second ground of challenge too must fail.

(3) Whether the 1st respondent's decision was tainted with illegality and irrationality and procedural impropriety.

[47] Mr Gan contended that the 1st respondent had come to a decision which no reasonable man similarly circumstanced would have come to. This is so since the 1st respondent's decision is tainted with 'wednesbury unreasonableness' in that his decision is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at it.

[48] He further contended that had the 1st respondent applied his mind and exercised his power judicially,

(a) he would have acted in compliance with the regulation to check the membership verification evidence before coming to the conclusion that there are 59.32% of the employees of the applicant who are members of the 2nd respondent and according recognition to the 2nd respondent;

(b) he would have given due consideration to or inquire on the facts raised by the applicant or given his reasons in disregarding those facts; and

(c) he would not have proceeded to accord recognition to the 2nd respondent by acting in toto the recommendation of the DGIR and DGTU without first verifying and determining the number and of workmen within the scope of representation of the 2nd respondent who are actually the members of the 2nd respondent;

(d) he alternatively ought not to take into account the seasonal employees in determining the percentage of the employees of the applicant who are the members of the 2nd respondent.

[49] It must be noted that there are two types of "wednesbury unreasonableness", the first type of "wednesbury unreasonableness" which refers to the term "unreasonableness" in the broad sense of that term and the second type of "wednesbury unreasonableness" which refers to a decision which is so outrageous or in defiance of logic that no sensible person who has applied his mind to the question could have arrived at such a decision. The distinction between these two types of wednesbury unreasonableness was highlighted and expounded in the Supreme Court case of *Harpers Trading (M) Sdn Bhd v. National Union of Commercial Workers* [1991] 2 CLJ 881; [1991] 1 CLJ (Rep) 159.

[50] In the case of *Associated Provincial Picture House Ltd. v. Wednesbury Corporation* [1948] 1 KB 223, Lord Greene MR stated at p. 230 that:

> It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the court can interfere. That, I think, is quite right; **but to prove a case of that kind would require something overwhelming** ...

[51] The test of unreasonableness as enunciated in the above case is not what the courts think is unreasonable, but unreasonableness here is something so absurd that no reasonable or sensible person could have come to that decision. And in our present case, the applicant has alleged the second type of "wednesbury unreasonableness" (which is also referred to as "manifest unreasonableness") and for it to apply, the applicant has to prove something "overwhelming".

[52] The issue here then is whether the applicant has succeeded in proving that the 1st respondent's decision is a decision which any decision maker, similarly circumstanced, would not have made.

[53] As averred to earlier, when answering the first and second ground of challenge, I had intimated that the DGTU, DGIR and the 1st respondent had followed strictly the letters of the law before coming to the conclusion on the percentage of workmen ie, that 59.32% of the applicant's employees are members of the 2nd respondent as at 10 September 1997.

[54] It must be remembered that the function of the DGTU is not adversarial but inquisitorial. This is on the authority of the Supreme Court in *Tanjong Jaga Sdn Bhd v. Minister of Labour and Manpower & Anor.* [1987] 2 CLJ 119; [1987] CLJ (Rep) 368. That case also decided that in exercising his functions, the DGTU (then known as the Registrar of Trade Unions) had an unfettered discretion which was only subject to the duty to act responsibly in the "Wednesbury" sense.

[55] Again, as averred to earlier, the decision of the 1st respondent depended on what materials and evidence were put before him and it must be reiterated that the two letters from the applicant dated 16 February 1997 and 26 May 1998 played a crucial role in the 1st respondent decision. In the letter dated 26 May 1998 the applicant opined that both its permanent and seasonal employees ought to be taken into account for the purpose of membership verification and the DGTU did just that and the 1st respondent acquiesced to the applicant's wishes. As such, why is the applicant now quarrelling and harping on this issue. The applicant should be estopped in raising this issue again. It is a non-issue.

[56] As to giving of reasons for his decision to accord recognition, this can be found in paras 6, 7, 9, 10, 13, 14 and 15 of the 1st respondent's affidavit. The 1st respondent has taken into account the letter of complaint from the 2nd respondent that 80 employees of the applicant had their services terminated as from 6 November 1997 in violation of s. 10(2) and (3) of IR Act which made it an offence for an employer to terminate the services of its employees once a claim for recognition is filed; the letter dated 16 December 1997 from the applicant informing that a majority of its seasonal employees had left from 2 November 1997-8 November 1997 and the applicant's support for a membership verification exercise to be done; the Forms B and C forwarded by the applicant and 2nd respondent listing their employees and members respectively and the result of the verification exercise and the manner in calculating the percentage by the DGTU. The 1st respondent too has stated clearly and equivocally that he has taken both seasonal and permanent employees into account even though a majority of them had left the applicant's service after November 1997 since these employees are as at 10 September 1997, ie, the date recognition was sought still the employees of the applicant.

[57] Therefore after perusing the 1st respondent's affidavit and the exhibits accompanying it, I feel that the 1st respondent's decision made on 1 June 1998 is one which any decision maker, similarly circumstanced, would have made it. It is not a decision that is so outrageous or in defiance of logic. In short it is not tainted with any "wednesbury unreasonableness" at all, whether of the 1st or 2nd type. The third ground of challenge too must also fail.

Conclusion

[58] In light of the reasons above, the applicant has failed to show any valid or cogent grounds upon which this court can exercise its discretionary power of judicial review to quash the decision of the 1st respondent.

[59] The application is therefore dismissed with cost. Cost of the 1st respondent will be carried on a solicitor and client basis pursuant to provision of s. 2(b) of the Public Authorities Protection Act 1940 (Act 198).

[60] Application dismissed.